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# In the Supreme Court of the United States

OCTOBER TERM, 1979

DURHAM DISTRIBUTORS, INC. and
WATERCRAFT SALES CENTER, INC.,
PETITIONERS,

*v.*

BOMBARDIER LIMITED and
BOMBARDIER EAST,
RESPONDENTS.

## PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

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## PETITIONERS' REPLY BRIEF IN SUPPORT OF THEIR PETITION FOR WRIT OF CERTIORARI

This brief is filed by petitioners Durham Distributors Inc. ("Durham") and Watercraft Sales Center Inc. ("Watercraft") in further support of their Petition for a Writ of Certiorari and in reply to the Brief of respondents Bombardier Limited and Bombardier East.

### Summary Statement of the Case

The jury found that Bombardier, the world's largest producer of snowmobiles, entered an agreement with Agrati-Garelli, an established Italian manufacturer of small motorcycles, to divide markets and not to compete. Answers to Special Interrogatories 3, 8 and 9 (A10-A11).[1] The Court of Appeals held this agreement to be "inherently anticompetitive"

[1] Respondent's Counterstatement Of The Case is little more than a reargument of factual contentions which were rejected by the jury. Thus, for example, Bombardier states that it had merely developed a

and a *per se* violation of Section 1 of the Sherman Act. (A18-21).[2] In order to implement that agreement, Agrati cut off its sales to Engine Specialties, Inc. ("ESI"), which had theretofore been its distributor of minicycles in North America. (A30). ESI was, as a result, unable to sell minicycles to its regional subdistributors, petitioners Durham and Watercraft.

However, defendants' conduct did not stop there. It was part of an "array of misdeeds" (A28), in which defendant Bombardier East participated (A10), which was designed to destroy both ESI and its distribution network. Durham and Watercraft were prominent parts of that distribution network.

ESI and, as a result, Durham and Watercraft, were cut off without warning. They were thus afforded no opportunity to obtain replacement minicycles from another source. (A26, A30).

Bombardier and its distributors then deliberately priced their Agrati minicycles at levels lower than the prices being charged by ESI, Durham and Watercraft for their remaining inventory of the same product. (A26). (Defendant co-conspirator Bombardier East, a wholly owned subsidiary of Bombardier Limited, was Durham's direct competitor in the distribution of minicycles in New England. It intentionally underpriced Durham.) This pricing activity rendered Durham, Watercraft and other ESI distributors unable even to sell off existing

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"crude" "hand-built" "prototype" minicycle, thereby suggesting that it did not seek to avoid competition with the Agrati-Garelli minicycle. (Respondent's Brief, p. 2.) In fact, the jury found that by November 1970, Bombardier had the intent and ability to manufacture and sell minicycles not later than the summer of 1971. (A11). The Court of Appeals concluded that the purpose of the agreement was to avoid "imminent" competition between Bombardier and Agrati. (A28-A29).

[2]Bombardier asserts, somewhat disingenuously, that there is no evidence that the Bombardier-Agrati agreement had any anticompetitive effect. (Respondents' Brief, p. 7). The Court of Appeals, however, ruled that the agreement was "inherently pernicious to competition" (A21) and the jury concluded that defendants' conduct "significantly lessened" competition in the relevant market. (A12).

minicycle inventories. Its effect on Durham's and Watercraft's relationships with their customers, when coupled with the sudden cessation of sales of new vehicles, was catastrophic. (App. 2191-2208; 2405-15; 2473-98; 2660-75; 3650-55; 3949-53; 3971-78; 3989-90).

Bombardier interfered with the supply of parts to ESI and its distributors. As defendants' expert conceded, such conduct foreseeably destroys the loyalty of minicycle dealers (App. 3604), and it did in this case. (App. 2411; 3976-78; 4061-63). Those dealers were the direct customers of Durham and Watercraft (and only the indirect customers of ESI).

Defendants, including Bombardier East, undermined the efforts of ESI's distributors by widely proclaiming that they would now be the exclusive distributors of Agrati minicycles. Defendants thereby "intimidated ESI distributors" (A26-27), including Durham and Watercraft, and they further damaged Durham's and Watercraft's credibility with minicycle dealers who had previously been led to believe that ESI and its distributors had the exclusive right to sell Agrati minicycles. (App. 3418; 2484-87; 3050; 3652; 4880-81; 4941). Bombardier East's employees spread false rumors at a trade show attended by New England motorcycle dealers—Durham's customers. (A9; App. 3650-52).

As a result of the conduct described above, Durham was driven out of business and Watercraft was forced to abandon the minicycle business. The jury found that Bombardier East was a participant in the illegal conspiracy and that the conduct of Bombardier *and* Bombardier East injured Durham and Watercraft. Answers to Special Interrogatory No. 3 (A10). It awarded substantial damages to both plaintiffs.[3]

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[3]Respondents' suggestion that Durham and Watercraft were somehow injured by ESI (Respondents' Brief, pp. 2-3), that Durham and Watercraft were never successful (Respondents' Brief, p. 2), and that Durham was awarded excessive damages (Respondents' Brief, p. 4), run counter to the jury's verdict, which was supported by substantial evidence and which no party has asked this Court to review.

## Reasons for Granting the Petition

### I. There Is a Conflict of the Circuits and Respondents Have Not Shown Otherwise.

The defendants argue that Durham's and Watercraft's "claim stems solely from the fact that Agrati terminated ESI...[and the fact that] as a result of ESI's termination, Durham and Watercraft were no longer able to distribute Agrati small motorcycles...." (Respondents' Brief, pp. 5, 10). Having thus mischaracterized Durham's and Watercraft's position, defendants cite certain cases for the proposition that a person does not have standing to sue for a violation of the antitrust laws where that person suffers damage solely because he has a business relationship with a separate person who is the immediate victim of an antitrust violation. (Respondents' Brief, p. 6).[4]

A. Assuming that defendants' characterization of Durham's and Watercraft's claim were correct, the defendants' argument serves only to emphasize the conflict between the Courts of Appeal. The cases cited in The Petition at pp. 11-15 hold that a plaintiff has standing to sue if the plaintiff, like Durham and Watercraft, is in the area of the economy foreseeably affected by an antitrust violation, regardless of whether the plaintiff is

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[4]Of the four cases upon which Bombardier and Bombardier East rely, one is a district court in the Third Circuit which was decided before *International Association of Heat and Frost Insulators and Asbestos Workers* v. *United Contractors Ass'n Inc. of Pittsburgh*, 483 F.2d 384 (3d Cir. 1973), described at p. 15 of the Petition, and two are Fifth Circuit decisions which precede *Hennessey* v. *National Collegiate Athletic Ass'n*, 564 F.2d 1136, 1148 (5th Cir. 1977), also described at p. 15 of the Petition. In the light of *International Association* and *Hennessey*, the cases cited by Bombardier and Bombardier East are of dubious current value as precedent.

the immediate victim of wrongdoing. The cases cited by Bombardier and Bombardier East contain different holdings and cannot be reconciled with those cases. Defendants make no attempt at reconciliation.

Moreover, Bombardier and Bombardier East do not dispute that the Court of Appeals decision in this case conflicts with the decisions of the Third, Fourth, Fifth and Eighth Circuits which are cited in the Petition at pp. 11-15. *Sanitary Milk Producers* v. *Bergjans Farm Diary Inc.*, 368 F.2d 679 (8th Cir. 1966) [per Blackmun, J.]; *South Carolina Council of Milk Producers Inc.* v. *Newton*, 360 F.2d 414 (4th Cir. 1966), *cert. denied* 385 U.S. 934 (1966); *Hennessey* v. *National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977); *International Association of Heat and Frost Insulators and Asbestos Workers* v. *United Contractors Ass'n of Pittsburgh*, 483 F.2d 384 (3d Cir. 1973).

Defendants do pick two Ninth Circuit cases cited in the Petition and argue that those decisions are not inconsistent with the decision below. In fact, these Ninth Circuit decisions cannot be reconciled with the decision of the Court of Appeals below.

In *Karseal Corp.* v. *Richfield Oil Corp.*, 221 F.2d 358 (9th Cir. 1955), plaintiff alleged that defendant Richfield precluded independent gasoline station operators from purchasing competitive products. Plaintiff sold a competitive product (car wax) to distributors who attempted to resell that product to gas station operators. Plaintiff alleged that defendant's conduct foreclosed sales by its distributors to station operators and that, as a result, sales by plaintiff to its distributors were adversely affected. There, as here, the immediate target of the restraint was, and the first impact of the restraint was felt by, a person with whom plaintiff had a business relationship. The court nevertheless held that plaintiff had standing to sue. It recognized that a participant in the chain of distribution for a product may sue for foreseeable injuries caused to it by conduct of a defendant which has its initial impact upon a different participant in the same chain of distribution.

Bombardier attempts to distinguish *Karseal* by asserting that there is "no evidence suggesting that the conspiracy [in this

case] was intended to restrain the distribution of small motorcycles." (Respondents' Brief, p. 9). On the contrary, there is substantial evidence here that Bombardier sought to arrogate the distribution of Agrati minicycles to itself and its distributors and to foreclose competition by ESI and its distributors, including Durham and Watercraft. Agrati and Bombardier agreed not to compete in the manufacture *and sale* of minicycles. (A19). As a result, ESI, Durham and Watercraft (which would otherwise have been the means of competition between Bombardier and Agrati in the sales market) were cut off. Agrati terminated sales without warning, thus depriving plaintiffs the time to obtain new products to sell. ESI, Durham and Watercraft were thereby deprived both of the ability to compete by selling Agrati minicycles and of the ability to compete by selling non-Agrati replacement vehicles. There was, in addition, substantial evidence of defendants' efforts to destroy ESI's entire distribution network by the "array of misdeeds" described above. The jury found that the Agrati minicycle competed in a relatively narrow product submarket and that competition in that submarket was "significantly lessened" by defendants' conduct. (A11). The Court of Appeals concluded that the "conspiracy's aim [was to] allocate the *sales* market for minicycles to Bombardier", citing the evidence described above. (A25). Therefore, the respondents' attempt to distinguish *Karseal* on the ground that there was in this case no attempt to restrain competition in the sale of minicycles is unavailing.

In *Karseal*, the defendant attempted to exclude competition by precluding plaintiff from selling its product through independent intermediaries. In the case at bar, the defendants sought to exclude competition by foreclosing Durham, Watercraft and others from buying their product through an independent intermediary (ESI). In either case, the purpose and effect were the same. The defendants intentionally and successfully excluded competition.

In *Solinger* v. *A & M Records, Inc.*, 586 F.2d 1304 (9th Cir. 1978), plaintiff was a potential purchaser of a distributor of

phonograph records. Plaintiff alleged that the defendants refused to sell to the record distributor because the record distributor had failed to comply with the defendant's territorial allocation scheme. The direct impact of defendant's conduct was upon the distributor. Defendant's conduct also had a derivative impact on plaintiff as a potential stockholder of the distributor. The court held that plaintiff had standing because he was "within the area of the economy that defendants should have foreseen would be affected by their violation of the antitrust laws". The court cited three other antitrust cases in which it had held that a plaintiff has standing when it suffers injury because of conduct which has its first impact on a person with whom plaintiff has a business relationship.

In the case at bar, Durham and Watercraft had an actual, not a potential, relationship with the immediate victim of defendant's conduct. Like the plaintiff in *Solinger*, they were deprived of their source of supply as a part of a scheme "to allocate the sales market for minicycles". (A25). Moreover, because Durham and Watercraft were driven out of the minicycle business, their exclusion from competition was as complete as was the plaintiff's in *Solinger*. Durham and Watercraft were within the area of the economy at which Bombardier and Bombardier East's restraints were directed and which was foreseeably affected by those restraints.

Therefore, even if defendants' characterization of Durham's and Watercraft's claim as "derivative" were correct, respondents have failed to show that the decision below is consistent with the decisions of other Courts of Appeal.

B. Bombardier's characterization of Durham and Watercraft's claim is not, however, correct. This is not a case of mere derivative injury. It is not correct that Durham's and Watercraft's "only connection to the violation is through their contractual right to purchase small motorcycles from ESI". (Respondents' Brief, p. 7). Durham and Watercraft were the

direct victims of a course of conduct, outlined above and described in the Court of Appeal's opinion, which was designed to destroy them and the rest of ESI's distribution network. Both were deprived of products without warning, deliberately underpriced, starved of spare parts, and subjected to anticompetitive advertising and rumor campaigns. Both were thereby driven from the market.

Durham, in particular, was a direct competitor of defendant co-conspirator Bombardier East. Durham was the target of, and was injured by, Bombardier East's pricing tactics and the rumors that Bombardier East spread among Durham's dealers.

Therefore, even under the tests which defendants claim are applicable here (Respondents' Brief, p. 5), Durham and Watercraft have standing. They were entities at which the antitrust violation was aimed. The defendants' violation did threaten a breakdown of competitive conditions at Durham and Watercraft's level of the economy.[5] As a result, the decision below conflicts not only with the Court of Appeals decisions cited in the Petition, but also with the cases cited by respondents in their Brief.

## II. This Case Offers an Excellent Opportunity To Decide the Full Range of Antitrust Standing Questions.

As noted in the Petition (p. 19), this case is before the Court on a full record, after a jury verdict and several decisions by the courts below on the standing question. The case presents the full spectrum of standing questions. Durham and Watercraft were injured, in part, by conduct directed initially at ESI but which

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[5] Defendants argue that "Durham and Watercraft did not operate at the level of the economy affected by the agreement not to compete". (Respondents' Brief, p. 6). The defendants thereby fail to note that Bombardier East participated in the conspiracy by engaging in the conduct described above and that Bombardier East operated in direct competition with, and at the same level of the economy as, Durham.

foreseeably injured them. Durham and Watercraft were also injured, in part, by conduct aimed directly at them. Durham was injured by acts of its direct competitor, Bombardier East, which was a defendant and was found by the jury to be liable to Durham. Watercraft was injured, in part, by the acts of Bombardier and a Bombardier distributor which was not a defendant. Consequently, this case presents an excellent opportunity for this Court to resolve the entire range of antitrust standing issues and to clear away the confusion generated by the conflicting discussions of the lower courts.

## Conclusion

For the reasons stated above and in the Petition itself, the Petition of Durham Distributors, Inc. and Watercraft Sales Center Inc. for a writ of certiorari should be granted.

Respectfully submitted,

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